

**APPEAL OF THE NOTICE OF DENIAL OF MONETARY AWARD CLAIM
FOR A PRE-EFFECTIVE DATE QUALIFYING
DIAGNOSIS OF ALZHEIMER'S DISEASE**

(REPRESENTATIVE CLAIMANT KENDRA STABLER MOYES – SPID: 950006982)

I. INTRODUCTION

Ken Stabler was a NFL Hall of Fame quarterback, loved by millions of fans, who played 9 years for the Oakland Raiders and 15 years overall in the National Football League. Mr. Stabler took innumerable blows to the head during his career. He died in 2015 after a terrible fight against metastatic colon cancer (as documented by his oncologist, in the record). He also died with a diagnosis of severe CTE and Changes of Alzheimer's disease in the brain (as documented by the Boston University Centers for Alzheimer's Disease and CTE (BU), in the record). While alive in 2014, expecting to recover from his prior cancer diagnosis, he did not elect to opt out of the Settlement. In 2015 after the Settlement was approved, he died.

Mr. Stabler's daughter Kendra Stabler Moyes was appointed Personal Representative of the Estate, and as Representative Claimant, filed the Estate's claim for a Pre-Effective Date Qualifying Diagnosis of Alzheimer's disease based on *both neuropathological evidence of Alzheimer's disease* (documented by BU Pathologist Ann C. McKee, M.D.) *and clinical evidence of Alzheimer's disease* (documented by BU Neuropsychologist Todd M. Solomon Ph.D., and in a Sworn Affidavit of his life partner Kim Bush who witnessed his cognitive demise.).¹

The Estate filed the claim on 9/27/18 (consisting of a 7-page statement reviewing the evidence, and 71 pages of medical record exhibits). The Claims Administrator denied the claim on the next day, (9/28/18) after a review period of less than 24 hours. So, as it stands the Estate of Ken Stabler, a man who died with CTE and Changes of Alzheimer's disease in the brain, **will recover zero in the NFL Concussion Settlement.** *This is an unconscionable injustice that the Stabler Estate respectfully requests be corrected by the Special Master, or the District Court Judge.*

Among the several compelling reasons, the Stabler Estate deserves a recovery under the terms and the fundamental purpose of this Settlement, is the fact that the NFL's Medical Expert Dr. Kristine Yaffe told this Court on 11/12/14, that Retired Players, just like Mr. Stabler, who died with CTE would most likely receive a Qualifying Diagnosis for one of the other neurocognitive diseases listed in the Settlement *if that Player went for a neurological evaluation before he died.*

Based on my review of the injury definitions and test battery agreed to under the Settlement Agreement, and accepting the findings in the McKee Study as accurate, at least 89% of the former NFL players studied by Dr. Stern, Dr. McKee, and their

¹ **The Stabler Estate does not seek a Monetary Award for a Qualifying Diagnosis of Death With CTE. Rather,** to the contrary, as explained in detail in this Appeal, the Estate's claim rests both on the clinical and pathological medical evidence that Mr. Stabler had Alzheimer's disease while alive.

colleagues would have been compensated under the settlement while living.

Yaffe Dec., ECF No. 6422-36 at ¶ 83.

Critically - the District Court and the Third Circuit both completely accepted and adopted this finding and relied on it to approve the Settlement (and its CTE recovery cutoff of 4/22/15) as fair and reasonable. *In re National Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 400 (E.D. Pa. 2015); *In re National Football League Players' Concussion Injury Litig.*, 821 F.3d 410, 442 (3d Cir. 2016).

This finding by NFL expert Dr. Yaffe, endorsed by this Court and the Third Circuit, along with the neuropathological and clinical evidence that Mr. Stabler had Alzheimer's disease while alive, should inform any determination and exercise of discretion by the Claims Administrator in the Stabler case to grant his Estate an Award.

The Settlement Agreement makes clear at § 6.6(b) that a recovery can be made “only in circumstances where a retired NFL Football Player manifests actual cognitive impairment while alive,” and the Stabler Estate has shown that through the BU Clinical Report and the Sworn Statement of Kim Bush.

The Settlement Agreement at § 6.4(b) also makes clear that for a Pre-Effective Date Qualifying Diagnosis, such as the one the Stabler Estate seeks for Mr. Stabler's Alzheimer's disease, the medical documentation requirements are not identical to those listed in the Injury Definitions Section.

Finally, FAQ #116 (9/19/18) makes clear that the Claims Administrator has the discretion to excuse a medical record requirement or a Diagnosing Physician Certification (DPC) requirement where credible evidence of the Qualifying Diagnosis exists, and the absence of any documentation requirement is explained.

The Claims Administrator has told counsel for the Stabler Estate that FAQ #89 (9/19/18) requires a living diagnosis, and without that, the claim must be denied (*See infra* at 8). However, the three provisions described above (Settlement Agreement §§ 6.4(b) and 6.6(b), and FAQ# 116) on their face allow the Claims Administrator to exercise discretion based on credible medical evidence of cognitive impairment while living, to excuse a technical documentation requirement; and the Claims Administrator has paid no heed to these Settlement terms and refused to exercise that discretion. A proper review of the medical evidence in this case, reviewed under the standards of §§ 6.4(b), 6.6(b) and FAQ #116 demonstrates that the Stabler Estate has put forth clear and convincing evidence of a Qualifying Diagnosis, and should be granted a recovery.

II. FACTS

Mr. Stabler played Quarterback in the NFL for 15 years. He was the NFL's MVP in 1974. He was inducted into the NFL Pro Football Hall of Fame in 2016 (posthumously). At the

end of his life, his body was racked with bone breaking injuries and relentless pain. He had lived with those physical ailments for decades. When Mr. Stabler reached the age of 66, he was diagnosed with metastatic prostate cancer. Treatment for prostate cancer went well, but a second cancer - cancer of the colon – struck Mr. Stabler in early 2015. Oncologist, Dr. Allison Wall, commenced chemotherapy immediately. In treatment, Mr. Stabler suffered from chemotherapy - induced nausea, chemotherapy - induced diarrhea, anemia, insomnia, and what the medical staff called a “chemotherapy fog.” At the same time, Mr. Stabler’s family could see in his later years that his cognitive faculties were rapidly declining. His family knew he was experiencing episodic memory problems, was repeating himself, and got lost in familiar places. The BU Clinical Report documented Mr. Stabler’s progressive memory loss in his 60’s. Although Mr. Stabler was struggling with the loss of his cognitive abilities, upon the diagnosis of his colon cancer in February 2015, his singular focus became survival - beating the cancer. While in chemotherapy, Mr. Stabler continued to fight, and he continued to plan for his future. But on July 4, 2015, he took a terrible and unexpected turn for the worse caused by a large obstruction in the colon, and four days later, on July 8, 2015 at the age of 69, Mr. Stabler passed away. Two days after his death, BU Pathologist Dr. Ann McKee autopsied Mr. Stabler’s brain – and found that he had “Changes of Alzheimer’s disease,” in the brain, and “Chronic Traumatic Encephalopathy (“CTE”) Stage III/IV.”

Mr. Stabler was diagnosed with metastatic prostate cancer 8/20/12. He received treatment at MD Anderson Cancer Center in Houston, and by February 2014 was doing well and looking towards a future with his family.

He feels well today. ...He has discussed the possibility of knee replacements with an orthopedic surgeon... from a prostate cancer perspective, he is doing superbly.

(MD Anderson Cancer Center – Medical Record (2/25/14) at 16 (Ex. 1); *see also* Affidavit of Dr. Allison Wall at ¶¶ 3-8 (Ex. 2)).

Nevertheless, Mr. Stabler’s daughters and his partner were beginning to see significant problems with his memory and his thinking. Kim Bush, Mr. Stabler’s partner for the last 16 years of his life recounted this as follows:

During this same time frame in 2014 and 2015, I was noticing that Kenny was losing his memory and some thinking abilities. I noticed he could no longer use the computer as he used to. He had successfully used the computer for years, but sometime in the 2014 timeframe he began to get more and more frustrated with the computer and asking for help frequently. Routine memory tasks like not knowing where his wallet or keys were, started to become a chronic problem. At some point in 2014, he would ask me to drive, even in familiar neighborhoods, because getting around from one place to another was becoming increasingly difficult. Kenny’s daughter Kendra and her children had mentioned to me that he seemed confused at traffic signals – something we had never seen

before. In 2014, I had to take charge of his daily medicines to make sure he took the correct pills at the right time. He could no longer do this on his own. Kenny had always been meticulous about personal cleanliness (dressing, showering, shaving), but I noticed this too was falling off and I helped him to maintain his personal cleanliness. He was often repeating himself in conversations and when I pointed this out to him he said he had no idea he was doing this, and just seemed frustrated.

(Affidavit of Kim Bush at ¶ 8 (Ex. 3) (emphasis added)).

The BU Clinical and Neuropathology Report confirmed a clinical history of progressive impaired memory and cognitive function, and pathological Alzheimer's changes in the brain.

In his early 60's he began having subtle memory problems often repeating himself. This issue progressed over the next several years in concert with forgetting recent events and complaining of headaches and increased sensitivity to light and noise. He also had chronic pain and tinnitus that significantly impacted his mood, which became more sullen and withdrawn. He also became more anxious [and] had suffered from insomnia.

(BU Clinical and Neuropathology Report (11/9/15) at PDF 2, 3 (Ex. 4)).

Although it appeared Mr. Stabler was overcoming his metastatic prostate cancer, a second cancer diagnosis – metastatic colon cancer- struck in February of 2015, and it became the central focus of Stabler's medical care and his life.

It is clear the patient's most immediately threatening malignancy is the metastatic colorectal cancer. We will prioritize management for this over the next several months per GI medical oncology.

(MD Anderson Cancer Center – Medical Record (3/12/15) at 19, 22 (Ex. 1)).

Chemotherapy for the colon cancer was begun and it took a tremendous toll on Mr. Stabler. Gulfport Memorial Hospital Oncologist, Dr. Allison Wall, who cared for Mr. Stabler at this time, reported the following:

69-year old male with a history of metastatic prostate cancer to bone diagnosed 8/2012 ... A CT chest/abdomen/pelvis was obtained on 2/2/15 in Arizona. This showed ... adenocarcinoma of the cecum with regional lymph nodes and peritoneal involvement ... Colonoscopy was done on 2/23/15 in Arizona and a villous oozing fungating infiltrative mass was found at the appendiceal orifice. The mass measured 15 cm in length. Pathology was consistent with invasive poorly differentiated adenocarcinoma,

signet ring cell type ... He reports arthritic pain ... This is moderate to severe and comes and goes ... He reports fatigue. Moderate to severe the week after chemo. Comes and goes ... He reports fatigue was for about one-week post chemo. He reports occasional tingling in his hands and feet ... He reports insomnia ... He reports abdominal pain resolved since chemo treatment. He reports general malaise and nausea post chemo... Poor appetite ongoing ... He reports diarrhea ...

(Gulfport Memorial Hospital - Clinic Notes of Dr. Allison Wall (3/30/15) at PDF 9-10 (Ex. 5); Affidavit of Dr. Allison Wall at ¶¶ 3-8 (Ex. 2)).

Chemotherapy continued through June, and treatment was considered to be progressing successfully. Mr. Stabler was planning for a future where he could be with his family and enjoy his remaining years. He underwent dental work in June 2015 and again discussed plans for his knee replacement surgery. Dr. Wall summarized Mr. Stabler's outlook at that time as follows:

His therapy was proceeding in a satisfactory manner in June of 2015 and we were cautiously optimistic about prolonging his life. He had recently undergone extensive dental work and was planning to have knee replacement surgery. He expected that he would survive the cancer and be able to enjoy his future years with his family.

(Affidavit of Dr. Allison Wall at ¶ 8 (Ex. 2)).

Mr. Stabler did not go to a neurologist in 2015 to obtain a Qualifying Diagnosis for a neurocognitive disease such as Alzheimer's or dementia - diseases he clearly had - because he was consumed with chemotherapy, pain, and a fight for his very survival, which ended abruptly and unexpectedly on July 8, 2015 upon his death.

Mr. Stabler became critically ill on July 4, 2015, as described by his oncologist Dr. Wall:

We admitted Mr. Stabler immediately. He was suffering nausea and vomiting, and we determined there was a severe bowel obstruction. He was seen by the surgeon and plans were made to operate the next day. He became unstable and was sent to ICU. He was suffering cardiac arrhythmias and respiratory failure. He was placed on a ventilator. It was determined he was not stable enough to undergo the surgery. His daughters and his partner opted for DNR status. He did not survive and expired on July 8, 2015.

(Affidavit of Dr. Allison Wall at ¶ 9 (Ex. 2)).

On July 4, 2015 Mr. Stabler took a sudden and unexpected terrible turn and died on July 8, 2015.

During the time he was fighting the colon cancer and receiving chemotherapy (February to June 2015), his only concern was beating the cancer and being with his family. His cancer treatments consumed him. The doctors gave us positive reports, so we were planning our future together. We were not planning to say goodbye. There was no discussion about death... During the time of cancer treatments, and at the end, we did not discuss the NFL Concussion Settlement. He did not ask me to set up appointments with other doctors like neurologists and neuropsychologists. He was focused completely on beating the cancer and surviving.

(Affidavit of Kim Bush at ¶¶ 14, 15 (Ex 3)).

* * *

I now understand he was potentially eligible to participate in the NFL Concussion Settlement. He did not raise with me any questions about neurological examinations or neuropsychological testing during the time I treated him for stage 4 colon cancer. It was clear to me his singular concern at that time was surviving the cancer and he devoted all his energy to that.

(Affidavit of Dr. Allison Wall at ¶ 10 (Ex. 2)).

III. KEN STABLER LIVED AND DIED WITH SEVERE NEUROCOGNITIVE DISEASE CAUSED BY FOOTBALL – HIS ESTATE DESERVES TO BE COMPENSATED

One would expect that the NFL Concussion Settlement Agreement, an Agreement designed to provide significant relief to the most severely brain - injured retired players, would put players like Mr. Stabler at the front of the line: 15 years in the league and clinical and pathological evidence of Alzheimer's disease.

The Recitals to the Settlement Agreement state that:

- “the lawsuits arise from the alleged effects of mild traumatic brain injury allegedly caused by the concussive and sub-concussive impacts experienced by NFL football players” –Stabler was one of those players.

And the Notice says:

- there will be monetary awards also for “Alzheimer’s disease,” - Ken Stabler’s BU Neuropathology and Clinical Report documents clinical and pathological evidence of Alzheimer’s disease – Mr. Stabler meets that criteria also.

Mr. Stabler manifested actual cognitive impairment while living, consistent with DSM-V diagnostic criteria for Alzheimer’s disease. Under the terms of the Settlement including §§ 6.4(b), 6.6(b), and FAQ #116 (9/19/18), the Court has the authority to provide relief to Stabler’s Estate to effectuate the central purpose of the Settlement. This Court and the Third Circuit have recognized that Retired Players that have a documented medical history like Mr. Stabler are highly likely if not certain to suffer neurocognitive injury. This recognition was noted in the reasons given for the approval the Settlement as fair and reasonable and the overruling of the objection to the elimination of the CTE benefit after the Final Approval Date. The Court noted and relied on the medical expert put forward by the NFL, Dr. Kristine Yaffe, who *told this Court that players with CTE upon death will nearly always be able to obtain a diagnosis of one of the other Qualifying Diagnoses if they go to a doctor when they are still alive.*

Based on my review of the injury definitions and test battery agreed to under the Settlement Agreement, and accepting the findings in the McKee Study as accurate, at least 89% of the former NFL players studied by Dr. Stern, Dr. McKee, and their colleagues would have been compensated under the settlement while living.

Yaffe Dec., ECF No. 6422-36 at ¶ 83; *see also In re National Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 400 (E.D. Pa. 2015); *In re National Football League Players’ Concussion Injury Litig.*, 821 F.3d 410, 442 (3d Cir. 2016).

And as the District Court acknowledged, the destructive neurodegenerative symptoms of CTE *start in life not at death*. 307 FRD at 402 (“... the alleged symptoms Death with CTE compensates did not begin when Retried Players died”). The Third Circuit also noted that long term Retired Players who suffer the symptoms associated with CTE will obtain relief.

This settlement will provide significant and immediate relief to retired players living with the lasting scars of an NFL career, including those suffering from some of the same symptoms associated with CTE.

821 F.3d at 444.

Mr. Stabler, as much as any Retired Player, lived with “*the lasting scars of an NFL career,*” and symptoms associated with CTE, including Alzheimer’s disease. The record on this is clear, (BU Clinical and Neuropathology Report at PDF 2, 3 (Ex. 4); Affidavit of Kim Bush at ¶ 8 (Ex. 3); Yaffe Dec., ECF No. 6422-36 at ¶ 83)), and remains true whether or not he visited a neurologist for testing in the final months of his life.

Settlement Agreement §§ 6.4(b), 6.6(b), and FAQ #116 provide the Claims Administrator, Special Master, and this Court with the authority to grant an Award in this case. FAQ #116 specifically calls for a showing of a reliable and verifiable explanation why any records or documentation are missing to verify the Qualifying Diagnosis. The Stabler Estate has made such a showing. The records show Mr. Stabler manifested actual cognitive impairment while alive, consistent with DSM-V based on both the clinical and pathological evidence. He had lost his short-term memory. He had lost his ability to maintain personal cleanliness, manage his medications, use words without repeating himself, and find his way around familiar neighborhoods. (Ex. 4 at PDF 2, 3; Ex. 3 at ¶ 8). Thus, he had memory loss, loss of executive function, and language difficulty that impaired his ability to function. He could not drive alone, handle his medicines, and he had difficulty with orientation and use of the computer. This was a progressive process that meets DSM-V criteria for Alzheimer's disease. (Exs. 3, 4). Mr. Stabler clearly was in the group of former football players that NFL expert Dr. Yaffe was referring to as those who would have been compensated under the settlement while living. Yaffe Dec., ECF No. 6422-36 at ¶ 83; *see also* 307 F.R.D. at 400; 821 F.3d at 442. Thus, under FAQ #116, it is clear that the documented evidence of actual cognitive impairment while living and his clinical and neuropathological findings of Alzheimer's disease verify the Qualifying Diagnosis; even if each of the technical documentation requirements is not met. Allowing a recovery here will not lead to an "opening of the floodgates." Mr. Stabler's situation was unique – his singular focus during his final months was on fighting metastatic colon cancer, *and his clinical and pathological findings of Alzheimer's disease are documented*. (Affidavit of Dr. Allison Wall at ¶¶ 8-10 (Ex. 2); Affidavit of Kim Bush at ¶¶ 14-15 (Ex. 3); BU Clinical and Neuropathology Report (Ex. 4)).

When the Claim was denied by the Claims Administrator on 9/28/18, less than 24 hours after it was filed, counsel for the Stabler Estate reached out to the Claims Administrator for clarification because the Denial itself first addressed CTE – a disease that the Stabler Estate had *not* filed a claim for. (Ex. 6 - Notice of Denial of Monetary Award Claim (9/28/18)). The Claims Administrator clarified the Denial by pointing to the FAQs such as FAQ #89 – which states that for Alzheimer's disease "a player had to be diagnosed while living ..." and that the Stabler claim lacked such a diagnosis. This is correct, but critically the Settlement Agreement §§ 6.4(b), 6.6(b); and FAQ #116 - specifically allow for the Claims Administrator to exercise discretion to excuse such a medical documentation requirement where other credible medical evidence shows the Retired Player had the disease while living; and the Claims Administrator has refused to exercise such discretion in this case.

Specifically:

- § 6.6(b) says there must be evidence the Retired Player "manifests actual cognitive impairment ... while living;" and this evidence has been presented here in the form of the BU Clinical Report and the Affidavit of Kim Bush (Exs. 4, 3).
- § 6.4(b) specifically allows for an exception to meeting the Injury Definitions criteria and here the compelling medical evidence of both the BU neuropathology evidence and the BU clinical evidence supports the Alzheimer's diagnosis. (Ex. 4).

- FAQ #116 states:

[Q] Are there other instances not listed in Section 8.2 of the Settlement Agreement where the Claims may excuse the medical records or Diagnosing Physician Certification Form Requirement? [A] Yes. The Claims Administrator has discretion to review and decide Settlement Class Members' requests to excuse the Diagnosing Physician Certification Form and/or medical records reflecting Qualifying Diagnosis requirements and to determine the appropriate date of diagnosis in such circumstances....

Here the Claims Administrator appears to have refused to exercise its discretion to even consider Dr. Yaffe's statement that players like Mr. Stabler most likely had a Qualifying neurocognitive disease while alive, and the critical impact that statement and its adoption by the District Court and Third Circuit should have when combined with the clinical and neuropathological evidence as to whether Mr. Stabler manifest cognitive impairment while alive. (Exs. 4, 3). The Claims Administrator also appears to have refused to exercise its discretion to consider the Affidavit of Oncologist Allison Wall M.D. in understanding the explanation for why Mr. Stabler did not visit a neurologist to obtain a living diagnosis in the last months of his life. (Exs. 1, 2, 5). This clear and convincing evidence, not considered by the Claims Administrator, shows that Mr. Stabler suffered from Alzheimer's disease while alive, and that his Estate deserves to recover under the Settlement.

The timing of these medical events and the severity of the painful and debilitating consequences of them was outside the control of Mr. Stabler. Mr. Stabler did nothing "wrong," and nothing "neglectful" in devoting himself to beating the cancer and believing he would survive the cancer treatments. He and his family acted in good faith in devoting all their energies to overcoming the cancer. *Mr. Stabler is dead and cannot cure any technical deficiency in his proof, however, the proof clearly establishes that he is entitled to a neurocognitive injury recovery.*

IV. CONCLUSION

The central purpose of the NFL Concussion Settlement is to compensate long-term veteran players who suffered neurocognitive disease. Mr. Stabler is that veteran player, but he died unexpectedly, and in his last months he was consumed with surviving cancer. In his unique, rare and compelling set of terribly unfortunate circumstances, it is not reasonable to assume he should have gone for a neurological or neuropsychological evaluation in his final months of life. Rather it is clear that he and his family acted in good faith and that the clinical and pathological evidence shows that he suffered the precise injuries this Settlement was supposed to remedy, including Alzheimer's disease while alive. To grant his Estate an Award based on this evidence would achieve the central purpose and goal of the Settlement.

Date: October 25, 2018

Respectfully submitted,

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Exhibit List:

1. MD Anderson Cancer Center - Medical Records.
2. Affidavit of Dr. Allison Wall (8/28/18).
3. Affidavit of Kim Bush (7/12/18).
4. Boston University School of Medicine Centers for Alzheimer's Disease and CTE - Clinical and Neuropathology Report (11/9/15).
5. Gulfport Memorial Hospital - Clinic Notes of Dr. Allison Wall.
6. Notice of Denial of Monetary Award Claim (9/28/18).